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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ARTURO GONZALEZ, Defendant and Appellant.	G049382 (Super. Ct. No. 09CF1140) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed in part and reversed in part with directions.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Martin E. Doyle, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Arturo Gonzalez of first degree murder (Pen. Code, § 187 [count 1]; all statutory citations are to the Penal Code unless noted), premeditated attempted murder (count 3), active participation in a criminal street gang (§ 186.22, subd. (a) [count 2]), and found he committed murder and attempted murder to benefit a criminal street gang (§ 186.22, subd. (b)). It also found that a principal to the homicide personally and intentionally discharged a firearm proximately causing death and great bodily injury (§ 12022.53, subd. (d), (e)(1)). Gonzalez contends, and the Attorney General concedes, the trial court prejudicially erred in instructing the jury it could convict Gonzalez of first degree premeditated murder under a natural and probable consequences theory of aiding and abetting a nonhomicide target offense. Gonzalez also contends there was insufficient evidence he committed attempted murder, and the trial court abused its discretion when it denied his new trial motion because of juror misconduct.

The parties agree reversal of the first degree murder conviction is required because of instructional error. We reject Gonzalez's claim of prejudicial juror misconduct, and conclude substantial evidence supports his attempted murder conviction. We therefore reverse Gonzalez's first degree murder conviction and remand for the District Attorney to either retry Gonzalez or accept a reduction of the offense to second degree murder. We affirm the remainder of the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of May 1, 2009, Angela Courette, her 18-year-old boyfriend Mario Chutan, and his friends, Omar Martinez and Mario de Rosas, attended a children's birthday party on Walnut Street in Santa Ana. Chutan and his friends belonged to Orange County Criminals (OCC), a gang operating in Santa Ana. Courette belonged to the Sullivan Street gang. Members of another Santa Ana street gang, the Lopers, also

attended the party. Members of these gangs peacefully attended the party because the Lopers got along with OCC.

The location of the party, however, posed the potential for a violent confrontation because it took place on Walnut Street, an area the Walnut Street gang claimed. The Sullivan gang was an occasional rival, and the Lopers hostile antagonists, of Walnut Street. The presence of the Lopers at a party on Walnut Street was an affront to Walnut Street gang members Gonzalez and Juan Castro, who received a telephone call alerting them about the party.

Gonzalez and Castro arrived at the party to confront their rivals. Courette heard someone say "where are you from" and "fucken lops [Lopers]." Chutan walked to the gate area and said "what's up then" and people started "yelling out their gangs and stuff." Someone in Chutan's party identified his group as Orange County Criminals. Courette told Chutan not to say anything because children were nearby. She urged Gonzalez and Castro to calm down because it was a child's birthday party. Gonzalez replied he did not "give a fuck" and told Courette to get out of the way. He walked past her, pulling his sweatshirt hood over his head, and Castro pulled out a gun and pointed it in Courette's face, but put the gun away and said "don't trip we're not gonna do nothing," explaining he had thought Courette's group was from the "Lops." But Chutan and Gonzalez continued to challenge one another and exchanged blows. Castro, who had been standing behind Gonzalez on the sidewalk, "blasted at [the] floor and then he just started blasting anywhere." Chutan was hit in the back as he walked away. Castro then fired six or seven shots, hitting Martinez and de Rosas.

De Rosas testified he was shot in his left wrist and both legs. He told a police officer he heard gunshots and ran toward the rear of the apartment complex. He felt a pinching sensation in his legs as he fled.

Anthony Valencia also attended the party and told a police officer the assailants walked across the street "throwing out Walnut" gang signs and claiming they

were from Walnut Street. The partygoers said "we're not from around here" and identified themselves as Orange County. The taller assailant wearing a black hooded sweatshirt and dark pants "clocked" one of the male partygoers in the face. The victim began "socking him back" and the taller assailant backed up and told his shorter companion "hey, blast him" or "blast 'em" or "blast this fool." The shooter, standing behind and to the left of the nonshooter, "started blasting." Valencia heard six or seven gunshots. Investigators collected nine, nine-millimeter cartridge casings from the scene.

Fifteen-year-old Alexis Gonzalez lived on Walnut Street in May 2009. She told an officer she saw Chutan fighting with another male. The male held Chutan by the shirt and punched him several times in the face. A second man, who she identified as Castro, came from across the street with a black semiautomatic handgun. He slid the slide back on the handgun and fired three to four shots. The two assailants fled together.

Police officers arrested Castro and Gonzalez at Castro's home, a short walk from the site of the homicide, the morning after Chutan's murder. Gonzalez attempted to flee from a rear entrance. In the southeast bedroom, officers found a notebook with Castro's name and writings suggesting Walnut Street gang affiliations and .38-caliber ammunition. They found clothing, including gloves and a black beanie, in the washing machine. In the northwest bedroom, officers found Gonzalez's driver's license or identification card, a cell phone, a pair of Gonzalez's prescription eyeglasses, male clothing, and a notebook containing gang writings.

The officers also searched Gonzalez's home. They found Walnut gang graffiti, and photos of Gonzalez with other Walnut Street gang members, including Castro, in gang poses, and .38-caliber ammunition. Officers found a gun cleaning kit in a bathroom closet.

Efren Mercado, a former Walnut Street gang member described the contours of the gang's territory and the role of its members, including "protect[ing] your neighborhood [and] always hav[ing a fellow gang member's] back," even if violence was

required. Walnut Street did not get along with Lopers and "bad things" would happen if they [the Lopers] came into the neighborhood. Mercado had known Walnut gang member Gonzalez since fifth grade. He also knew gang member Castro.

Gonzalez described the May 2009 shooting to Mercado while they were both in jail in 2010. Gonzalez explained he was at Castro's home when he received a phone call advising that Lopers were at a nearby party. He and Castro walked over and did a "hit up," and Gonzalez got into a fight with an OCC gang member. Castro told Gonzalez to step aside and then fired his gun at the crowd. Mercado explained a gang member who did a "hit up" would expect violence to occur.

Detective Julian Rodriguez, a police officer with gang expertise, also described the gang culture and explained the importance of respect and power in the gang underworld. He testified Walnut Street was an established criminal street gang, comprised of approximately 50 members who engaged in violent criminal conduct and weapons possession. Both Gonzalez and Castro identified themselves as Walnut Street gang members and were actively participating in the gang on May 1, 2009. In 2006, Gonzalez told another officer Walnut Street was at "war" with the Lopers because they murdered a fellow gang member. In 2008, Gonzalez talked to a police officer about gang guns, and Gonzalez agreed a gang member would tell fellow gang members about the presence of a gun because "people should know about" a weapon so it could be used if needed. Rodriguez opined the current crimes benefitted the gang.

Following a trial in October 2013, the jury convicted Gonzalez as noted above. In December 2013, the trial court imposed a term of 25 years to life for first degree murder plus a consecutive term of 25 years to life for the associated firearm enhancement. The court imposed a consecutive term of life with possibility of parole for attempted premeditated murder, plus a consecutive 20-year term for the associated firearm enhancement. The court imposed and stayed (§ 654) a two-year midterm for active gang participation.

II

DISCUSSION

A. *Juror Misconduct*

During the defense case, the prosecutor advised the trial court a juror had spoken to Officer Jason Garcia after he testified the day before that he participated in the search of Castro's home and found Gonzalez's driver's license and other items. He placed the license with Gonzalez's other jail property rather than impounding it into evidence.

According to the prosecutor, the juror said something to Garcia like, "Hey, I was kind of naive before this trial, and I wanted to just thank you for all of the service you give the community." Juror No. 11, who later became the jury foreperson, admitted she "thanked [Garcia] for his – I said, "I wanted to thank you for the work that you do in the – to service to our country.'" She said Garcia replied, "Thank you. That meant a lot." Juror No. 11 stated she was "very patriotic" and thanked "every vet" she met, but acknowledged she violated the court's admonitions and should not have spoken to Garcia. She stated the incident had not caused her to form any opinions about the issues in the case. She also stated she took a lot of notes and was very "even minded."

Defense counsel requested the juror's removal for cause and replacement with an alternate juror, explaining the court did not "know the extent of the conversation," and the juror's remark did not "exhibit[] fairness and impartiality" toward his client. The prosecutor objected to removal, arguing the remark was "very innocuous." The court declined to remove the juror: "I don't see that what she said was really particularly prejudicial other than just misconduct, but I don't know that it rises to the level she should be excused." The court later denied Gonzalez's motion for a new trial based on the misconduct.

Gonzalez contends the trial court abused its discretion and violated his Sixth and Fourteenth Amendment rights to a fair trial, an impartial jury, and due process

when it denied his new trial motion. He argues Juror No. 11 committed misconduct, and demonstrated she was incapable of understanding and following the court's instructions: "If Juror No. 11 could not understand one simple instruction that had been repeated in various ways some 17 times over a four-day period, it beggars belief to expect that she would be able to understand the 57 instructions with which the court charged the jury here, which were read to them only once."

A juror's unauthorized contact with a witness or other trial participant is improper. (*People v. Cowan* (2010) 50 Cal.4th 401, 507; *People v. Hardy* (1992) 2 Cal.4th 86, 175 (*Hardy*); see § 1122 [court shall instruct jurors not to converse among themselves, or with anyone else, conduct research, or disseminate information on any subject connected with the trial at each adjournment of the court].) A defendant does not suffer prejudice, however, if the contact was "de minimis" or if the contact was unrelated to the trial. (*Hardy*, *supra*, 2 Cal.4th at p. 175; *In re Price* (2011) 51 Cal. 4th 547, 562 [prosecutor had drinks at a bar where a sitting juror worked as a cook; prosecutor tipped waiter and joked he should split it with the cook and that she should vote guilty; no substantial likelihood juror would have viewed the comment as significant or as an attempt to influence her vote].)

In *People v. Ryner* (1985) 164 Cal.App.3d 1075 (*Ryner*), a police officer witness conversed outside the courtroom with some of the jurors. Neither the officer's testimony nor any aspect of the case was discussed. The topics included a football playoff game, the type of gun the officer carried, weapons in general, the officer's experiences on the police force, his Vietnam military service, and that he was fatigued after working the graveyard shift the night before. The officer testified at a hearing on the defendant's mistrial motion he did not discuss the case and participated in the conversation to be friendly. The seven jurors recounted the conversation, stated they did not discuss the case, and none felt their brief conversation compromised their ability to fairly and impartially decide the case according to the evidence. The appellate court

concluded the jurors committed misconduct even though they did not discuss any matters related to the case because a friendly conversation might cause a juror to accord the officer's testimony greater credibility. But the court also concluded no prejudice had been shown and therefore reversal was not required. (*People v. Sutter* (1982) 134 Cal.App.3d 806, 820 [jury misconduct not prejudicial per se].)

Ryner assumed a presumption of prejudice arose, but it was rebutted by proof no prejudice actually resulted. (*Ryner, supra*, 164 Cal.App.3d at p. 1082.) The court considered factors including the strength of the evidence misconduct occurred, the nature and seriousness of the misconduct, whether the misconduct lightened the prosecutor's burden, the effect of the misconduct on the defense case, and the probability that actual prejudice may have ensued. (*Ibid.*; see *Hasson v. Ford Motor Co*. (1982) 32Cal.3d 388, 417 [presumption of prejudice arising from juror misconduct rebutted where reviewing court's examination of the entire record shows no reasonable probability of actual harm].)

In concluding the misconduct of the jurors did not warrant a reversal, the *Ryner* court explained, "The conversation between the jurors and Officer Boyd was limited to topics unrelated to the case at hand. It was a brief encounter . . . . '[M]ere social amenities' . . . were all that the jury members and Officer Boyd exchanged. The conversation was so brief and innocuous that we regard it as trivial misconduct. [Citation.]" (*Ryner, supra*, 164 Cal.App.3d at p. 1083.) The court also noted Boyd was not a critical prosecution witness, his testimony would have little adverse effect on the efforts of the defense to challenge the identifications, and the cumulative evidence against the defendant was strong. "Given the strength of the prosecution's case, the trifling nature of the misconduct and its minimal impact upon the case, we conclude that the record demonstrates no actual prejudice to appellant from the indiscretions of the jurors." *Ryner, supra,* at p. 1084.)

We agree with the trial court Juror No. 11 committed misconduct by violating the court's repeated admonitions not to have contact with participants in the case. But any presumption of prejudice was rebutted because the contact here was de minimis and did not relate to the trial or Garcia's testimony. Garcia was not a critical prosecution witness, his testimony did not harm or undermine the defense, and the cumulative evidence against the defendant was strong. (See *People v. Marshall* (1990) 50 Ca1.3d 907, 950 [minor jury misconduct tolerated because it is impossible to require jury to be a laboratory, completely sterilized and free of any external factors].) Nor are we persuaded by Gonzalez's arguments Juror No. 11's statements, perhaps considered in conjunction with her background disclosed during voir dire – e.g., a grandfather she did not know had been a sheriff in another state – established she was biased against Gonzalez and that Juror No. 11's brief remarks to Garcia demonstrated she could not understand or follow the court's other instructions. We see no reason to deviate from the standard presumption that jurors follow the instructions and therefore we presume Juror No. 11 adhered to the trial court's instructions. (*People v. Houston* (2005) 130 Cal.App.4th 279, 312.)

B. *The Trial Court Prejudicially Erred By Instructing the Jury It Could Convict Gonzalez of First Degree Murder as an Aider and Abettor Under a Natural and Probable Consequences Theory*

After the case was tried, the Supreme Court held a first degree murder conviction cannot be based on a natural and probable consequences theory where the nonperpetrator defendant aided and abetted a nonhomicide target offense. (*People v. Chiu* (2014) 59 Cal.4th 155, 158-159, 166 (*Chiu*).) A nonperpetrator defendant who aids and abets a nonhomicide target offense is liable only for second degree murder because "punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine." (*Ibid.*)

Here, the trial court instructed the jury they could convict Gonzalez of first degree murder under three possible theories: (1) the natural and probable consequences doctrine; (2) aiding and abetting; or (3) conspiracy. The parties here agree the trial court prejudicially erred by instructing the jury it could convict Gonzalez of first degree murder if it found he aided and abetted Castro in an assault (§ 240) or disturbing the peace (§ 415) under a natural and probable consequences theory. (CALCRIM Nos. 400, 401, 403; see also CALCRIM Nos. 416, 417 [defendant guilty of first degree murder if he conspired to commit assault or disturbing the peace, codefendant committed first degree murder to further the conspiracy and first degree murder was a natural and probable consequence of the common plan or design of the conspiracy].) Because we cannot determine which theory the jury adopted, reversal is required. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129 [when a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reviewing court must reverse unless there is a basis in the record to find that the verdict was based on a valid ground].) *Chiu* held the remedy for the error is to reverse the first degree murder conviction and to allow the People the option of accepting a reduction of the conviction to second degree murder, or retrying the murder charge under a direct aiding and abetting theory. (*Chiu, supra*, 59 Cal.4th At pp. 158-159, 168.) Gonzalez agrees we are required to follow the remedy recognized in *Chiu*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[1]

[1] In his reply brief, Gonzalez argues resentencing him on the second degree murder charge as an aider and abettor would violate his rights to due process and a jury trial. The Ninth Circuit granted rehearing en banc in the case on which he relies. (*Taylor v. Cate* (9th Cir. 2015) 772 F.3d 842, rehearing en banc 787 F.3d 1241, June 05, 2015; see Federal Rule of Appellate Procedure 35(a), Ninth Circuit Rule 35–3 [opinion shall not be cited as precedent by or to any court of the Ninth Circuit].) We are bound to follow *Chiu*.

C. *Attempted Murder of De Rosas*

Gonzalez also challenges the sufficiency of the evidence to support the jury's conclusion he attempted to murder De Rosas. On appeal, we must view the record in the light most favorable to the judgment below. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) The test is whether substantial evidence supports the verdict (*People v. Johnson* (1980) 26 Cal.3d 557, 577; *Jackson v. Virginia* (1979) 443 U.S. 307, 318), not whether the appellate panel is persuaded the defendant is guilty beyond a reasonable doubt. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) It is the jury's exclusive province to weigh the evidence, assess the credibility of the witnesses, and resolve conflicts in the testimony. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.) Accordingly, we must presume in support of the judgment the existence of facts reasonably drawn by inference from the evidence. (*Crittenden,* at p. 139; see *People v. Stanley* (1995) 10 Cal.4th 764, 792 [same deferential standard of review applies to circumstantial evidence].) The fact that circumstances can be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933 (*Bean*).) Consequently, an appellant "bears an enormous burden" in challenging the sufficiency of the evidence. (*Sanchez,* at p. 330.)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.] To be guilty of a crime as an aider and abettor, a person must 'aid[ ] the [direct] perpetrator by acts or encourage[ ] him [or her] by words or gestures.' [Citations.] . . . . When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person 'must share the specific intent of the [direct] perpetrator,' that is to say, the person must 'know[ ] the full extent of the [direct] perpetrator's criminal purpose and [must] give[ ] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator's commission of the crime.' [Citation.] Thus, to be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement with knowledge

of the direct perpetrator's intent to kill *and* with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing –which means that the person guilty of attempted murder as an aider and abettor must intend to kill. [Citation.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623-624, original italics; *People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 7; see *People v. Mitchell* (1984) 183 Cal.App.3d 325, 330 [factors relative to a finding of aiding and abetting are "presence at the scene of the crime, companionship, and conduct before and after the offense, including flight"].) Evidence of a defendant's intent must be derived from all the circumstances of the attempt, including the defendant's actions. *(People v. Smith* (2005) 37 Cal.4th 733, 739, 741.)

Gonzalez agrees Castro's firing into a crowd of people from a short distance away demonstrates *Castro's* intent to kill De Rosas, but argues the evidence was insufficient for the jury to infer Gonzalez shared Castro's intent to kill.

We have related the evidence in detail above. The jury could infer Gonzalez and Castro, working in tandem as enforcers for Walnut Street gang, received a phone call from a confederate alerting them to the incursion of possible rivals into Walnut Street territory. Gonzalez and Castro obtained a gun and arrived at the party intending to violently confront the Lopers, who appear to have been aligned in this instance with the OCC gang, including Chutan and De Rosas. Gonzalez pulled up his hood and walked toward Chutan. A fistfight with Chutan ensued, and then Gonzalez told his gunman, Castro, to fire from close range. While there was some dispute concerning the words Gonzalez used (blast "him" or "'em" or "this fool"), the jury reasonably could conclude that Gonzalez shared Castro's intent to empty the gun's magazine into the Lopers and OCC groups and take down as many rivals as they could. As the testimony of gang experts Rodriguez and Mercado demonstrated, this would amplify the duo's prestige within the Walnut Street gang, and serve as a potent reminder of the gang's presence and project its power to the gang's rivals and in the neighborhood the Walnut Street gang claimed. Substantial evidence therefore supports the jury's verdict.

III

DISPOSITION

Gonzalez's conviction of first degree murder (count 1) is reversed. On remand the People may accept a reduction of the conviction to second degree murder. If, after the filing of the remittitur in the trial court, the People do not retry Gonzalez on the count 1 murder charge within 60 days (see § 1382, subd. (a)(2)), unless Gonzalez waives his right to a speedy trial, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of second degree murder on count 1 and shall resentence Gonzalez accordingly. In all other respects, the judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.